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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 477

AMERICAN EXPORT LINES, INC.,
Petitioner,

—against—

CATERPILLAR OVERSEAS, S. A.,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARIO E. DE ORCHIS,
Counsel for Petitioners,
80 Broad Street,
New York 4, N. Y.

CLIFFORD J. BRENNER,
Of Counsel.

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Argument

Respondent's Brief in opposition only serves to point up the impossible and perilous position in which ocean carriers would be cast if the interpretation given by the Court below to the words "proper delivery" in the Harter Act was upheld.

Respondent does not dispute that the clauses in question have been in common use for many years in most bills of lading issued in ocean commerce. They appear in the Uniform North Atlantic Bill of Lading and in the standard Warshiplading form used by the U. S. Government. *Knauth, Ocean Bills of Lading*, 1953, pp. 93-109.

Both respondent and petitioner had been doing business at Tripoli for many years through their respective agents. The bill of lading provided in Clause 4 that:

> "When the goods are discharged from the ship, as herein provided, they shall be at their own risk and

> expense; such discharge shall constitute complete delivery and performance under this contract and the carrier shall be freed from any further responsibility."

Respondent does not question the fact that this clause was in complete accordance with the official Port Regulations of the Port of Tripoli, the place where the goods were to be discharged and delivered. Instead, respondent makes the startling argument that in order to make "proper delivery" under the Harter Act, the Petitioner was bound to disregard the laws of Tripoli and to assume custody and control of the goods beyond ship's tackle despite the fact that such action would be in violation of the Port Regulations of the Administration of Tripolitania.

Respondent states:

> "The question of when a common carrier's responsibility ceases in respect of cargo shipped from an American port and discharged to a lighter at the port of destination, is governed by Federal Statutes and the decisions of Federal Courts construing those statutes—and not by a Tripoli port regulation. * * * We submit it is a hitherto unhead of doctrine which would permit a port regulation of a foreign country to replace the basic policy of the Harter Act of making a carrier responsible for a 'proper' delivery. * * * * *" (Respondent's Brief, p. 12)

We submit that Congress never intended that in order for a carrier to make "proper delivery" at a foreign port, it must disregard and violate the laws of that port. We submit that all that Congress meant by using the simple words "proper delivery", is that the carrier was bound to deliver cargo in accordance with the usual custom and law of the place agreed upon by the parties at the port of discharge. This is the established rule of general maritime law followed by this Court in many decisions. That this was also

the intent of the parties is shown by Clause 5 of the bill of lading:

> "5. The Carrier, Master and ship shall have liberty to comply with any orders or directions as to . . . . discharge, destination, delivery . . . . given by the government of any nation or department thereof . . . ."

Respondent further contends that the Court below did not err in applying Section 4 (2) (q) of COGSA because the Act was made applicable to the present case by Clause 1 of the bill of lading. This is not true and such would have been evident if Respondent had not left out part of the quoted sentence on page 6 of its Brief in Opposition. The part left out is shown in Italics:

> "*The provisions stated in said Act* shall *(except as may be otherwise specifically provided herein)* govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in custody of the carrier" (Appendix Record, Vol. II, p. 57).

The general wording of this clause does not apply in a lighterage situation because of the express specific language of the lighterage clauses. This very question involving the identical clauses was decided in *Federal Insurance Co. v. American Export Lines, Inc.*, 113 F. Supp. 540 (S. D. N. Y., 1953).

In *Remington Rand, Inc., v. American Export Lines, Inc.*, 132 F. Supp. 129 (S. D. N. Y., 1955), cited on p. 11 of Respondent's Brief, the Court followed the *Federal Insurance Co.* case in upholding the contention then being made by Mr. Prem, who was libelant's proctor, that the provisions of COGSA were not applicable since "the cargo had left ship's tackle and rested on lighters". 132 F. Supp. 138-139. Mr. Prem now takes exactly the opposite stand.

North American Smelting Co. v. *Moller S. S. Co.*, 204 F. 2d 384 (3rd Cir., 1953), cited at p. 10 of Respondent's Brief, supports Petitioner's contention, not libelant's. It teaches that constructive delivery upon discharge is valid under the Harter Act and that the test is whether the carrier exercises reasonable care "under the circumstances". The Third Circuit Court refused to apply COGSA to a loss occurring after discharge.

Morris v. *Lamport & Holt Ltd.*, 54 F. 2d 925 (S. D. N. Y., 1931), aff'd. 57 F. 2d 1081 (2d Cir., 1932) is not in point as the cargo was delivered to carrier's agent ashore and the agent hired lighters to carry it out to the ship. The lighterage was part of the service included in the freight paid to the carrier.

Isthmian Steamship Company v. *California Spray-Chemical Corp.*, 290 F. 2d 480 (9th Cir., 1961), adhered to on re-argument, 300 F. 2d 41 (9th Cir., 1962), reaches the shocking conclusion that "proper delivery" on the Harter Act can be made *only to a wharf* and no where else, despite the long line of Supreme Court cases which teach that proper delivery depends on custom and law of the port, and that such delivery will discharge the carrier of his responsibility. The 9th Circuit relied on dictum in *Tan Hi* v. *United States*, 94 F. Supp. 432 (N. D. Cal., 1950). But the Court in the *Tan Hi* was careful to point out that the carrier was bound to deliver to a wharf "only when custom, regulation or law of the port did not otherwise provide". Moreover, in the *Isthmian* case the parties intended that delivery to a wharf should be made. This is made clear at 300 F. 2d 44:

> "We believe that here the parties understood that the obligation created between them required delivery to a wharf. . . . Thus the carrier contracted

> under the assumption that there could be lighters used to effect delivery which would be operated and controlled by the carrier *prior to delivery*".

It is submitted that Judge Pope's concurring opinion reported at 300 Fed. 2d 49-51 is a far better decision:

> "I am unable to discover that any Court has ever given to the Harter Act the construction which the majority opinion now proposes to give it. . . . I am convinced that the appellant is right in its contention that § 1 of the Harter Act does not deal with the scope of the carrier's obligation as to the place of delivery; that the Act does not determine how, when or where the carrier must deliver cargo but only prevents the carrier from avoiding liability for loss arising from negligence in delivering to such place as the carrier has in fact undertaken to deliver the cargo. . . . It is my view that the Harter Act and its purpose must be judged by the language of the Act: I do not subscribe to the majority's undertaking to extend the Act by reference to its 'spirit and purpose'."

The lighterage clauses in the *Isthmian* case were different from those in this suit. Moreover, the majority opinion intimated that clauses relieving the carrier from liability during *necessary* lighterage might be valid under the Harter Act, but it did not decide the point. 300 F. 2d 41, 47. There is no question in the case at bar that lighterage at Tripoli was in fact necessary.

Nor does Respondent claim Petitioner could have delivered the goods directly to consignee. The law of Tripoli required delivery in this case be made to a licensed lighterman and provided that "when goods are discharged from a ship, the responsibility of the carrier or stevedore shall cease when such goods are removed from ship's tackle . . ." (Appendix Record, Vol. II, p. 60).

Thereafter the vessel did not and could not control or possess the goods. Nevertheless, the Court of Appeals took the view that, "By equating 'discharge' with 'delivery' the carrier seeks to eliminate the operation of the Harter Act upon foreign trade." Obviously this is not so. The duties to discharge properly (COGSA) and to make "proper delivery" (Harter Act) involve entirely different responsibilities. One involves the unloading of the cargo in a safe manner from the vessel and the other involves the transfer of possession of the goods, actually or constructively, to the receiver. Proper delivery here was not accomplished by "mere discharge" but by transferring possession and control of the goods after discharge at the end of ship's tackle to the licensed lighterman who was authorized by the law of Tripoli to receive the goods on behalf of consignee.

It is significant that no one at Tripoli blamed the vessel. Clean receipts were issued to the vessel both by the lighterman and the port authorities after the accident occurred. Consignee filed no Notice of Claim against the vessel. Had underwriters filed suit in Tripoli instead of New York, Petitioner would not find itself in its present situation.

The decision of the Court of Appeals in this case and the *Isthmian* case in the Ninth Circuit have left the law as to carrier's responsibility for lighterage at foreign ports in a state of confusion. This is a vitally important question to the shipping industry as the hundreds of ports now being operated by new countries in Africa and other underdeveloped areas depend largely on lighterage because of their shallow harbors. Carriers now find themselves torn between various interpretations given to the words "proper delivery" in the Harter Act by the Circuit Courts here and requirements of proper delivery as stipulated by local law at various ports of call. Only the Supreme Court can resolve the dilemma and clear the air once and for all.

CONCLUSION

A WRIT OF CERTIORARI SHOULD BE GRANTED IN ACCORDANCE WITH THE PRAYER OF THIS PETITION.

MARIO E. DE ORCHIS,
Counsel for Petitioners,
80 Broad St.,
New York 4, N. Y.

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